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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1944 **No. 44**

GERHARD WILHELM KUNZE, AUGUST KLAPPROTT, GUSTAV ELMER, HERMANN SCHWINN, HERMAN AGNE, JOSEPH BACHMAIER, JOSEF BELOHLAVEK, CARL FREDERICK BERG, WALTER BORCHERS, OTTO BREGLER, ERNEST MARTIN CHRISTOPH, OTTO FENTZKE, JOHN C. FITTING, BRUNO KNUPFER, WILLIAM C. KUNZ, WILLIAM OTTERSBACH, MAX RAPP, LOUIS SCHATZ, WALTER SCHNELLER, Jr., HUGO WEISS, KARL RICHARD WENDLANDT, OTTO WILLUMEIT, FRITZ STREUER,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AS AMICUS CURIAE

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Statement

The Circuit Court of Appeals below assigned John F. X. Finn to represent the petitioner Rapp in that Court, and pursuant to such assignment oral argument was duly made on behalf of said petitioner in the court below. In this Court there is doubt as to the status and duty of said John F. X. Finn to represent the petitioner Rapp because said petitioner has in writing rejected the services in this Court of said assigned counsel. This brief is filed in the capacity of *amicus curiae* pursuant to motion which the Court will be duly asked to entertain. The point herein developed is urged not only on behalf of the petitioner Rapp but also on behalf of all petitioners represented by assigned counsel.

Opinion Below

The opinion below of the Circuit Court of Appeals for the Second Circuit is officially reported in 141 Fed. (2) 248 (1944) and is included in the printed Transcript of the Record filed herein (R. 1070-85).

No opinion was rendered by the District Court for the Southern District of New York.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1924 (28 U.S.C.A., Sec. 347).

Statement of the Case

This brief adopts the Statement of the Case which is contained at pages 2-17 of the consolidated brief filed on behalf of all petitioners represented by assigned counsel.

Specification of Errors Urged

The Circuit Court of Appeals erred in holding that the statute upon which the indictment was based was constitutional.

ARGUMENT

POINT I

The statute upon which the indictment was based was unconstitutional.

At the very outset of the trial, the defendants duly urged the unconstitutionality of 50 U.S.C. Sections 308 (i) and 311 which are "inextricably interwoven" (fols. 24 through 48, R. pp. 16-18). This contention was again raised in the Court below and it is now respectfully urged upon this Court.

Section 308 (i) of the Statute provides (italics supplied):

> "It is the expressed policy of the Congress that whenever a vacancy is caused in the employment rolls of *any business* or industry by reason of induction into the armed services of the United States of an employee pursuant to the provision of this Act such vacancy *shall not be filled* by any person *who is a member of the Communist Party or the German-American Bund*". (It should be borne in mind that every member of the Bund was an American citizen.)

We ask the reader, if a Protestant, Jew or Catholic, to read that one of the following paraphrases of the section which is applicable to him:

Protestant: "It is the expressed policy of the Congress that whenever a vacancy is caused in the employment rolls of any business or industry by reason of induction into the armed services of the United States of an employee pursuant to the provisions of this Act such vacancy shall not be filled by any person *who is a member of the Free and Accepted Order of Masons, or of the Young Men's Christian Association*".

Jew: "It is the expressed policy of the Congress that whenever a vacancy is caused in the employment rolls of any business or industry by reason of induction into the armed services of the United States of an employee pursuant to the provisions of this Act such vacancy shall not be filled by any person *who is a member of the B'Nai Brith or of the Young Men's Hebrew Association*".

Catholic: "It is the expressed policy of the Congress that whenever a vacancy is caused in the employment rolls of any business or industry by reason of induction into the armed services of the United States of an employee pursuant to the provisions of this Act such vacancy shall not be filled by any person *who is a member of the Ancient Order of Hibernians or of the Knights of Columbus*".

Section 311 provides, with italics supplied:

"Any person charged as herein provided with the duty of carrying out *any* of the provisions of this Act, or the rules and regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty * * * and any person * * * who otherwise evades registration or service in the land or naval forces *or any of the requirements of this Act, or of said rules, regulations or directions*, or who in any manner shall knowingly fail or neglect to perform *any duty* required of him under or in the execution of this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act, or the rules or regulations made pursuant thereto, or conspire to do so, shall, upon conviction in the District Court of the United States having jurisdiction thereof, be punished

by imprisonment for not more than five years or a fine of not more than Ten Thousand ($10,000) Dollars, or by both such fine and imprisonment * * *".

Thus Section 311 directly relates back to Section 308(i) with its unwise, unfortunate and un-American requirement, regulation or direction, heretofore italicized.

To be sure, in Section 14b of the Act, there is a separability clause, upon which the opinion of the Circuit Court relies. But that learned court overlooked the fact that the language of the separability clause, which it quoted, only provides that "if any provision of this Act, *or the application thereof* to any person or circumstance is held invalid, the remainder of this Act, and the application of such provision *to other persons* or circumstances, shall not be affected thereby".

Reflection upon the italics which we have supplied makes inapposite the "separability cases" cited by the Circuit Court below (*Elec. Bond & Share Co.* v. *SEC*, 303 U. S. 419, 434; *Champlin* v. *Commission*, 286 U. S. 210, 234; *Reitz* v. *Mealey*, 314 U. S. 33, 39).

We do not contend that the entire Selective Service Act is unconstitutional.

We do contend that Section 308 (i) is unconstitutional as to United States citizens who are members of the German-American Bund.

We do not contend that Section 311 is unconstitutional as to persons *other* than those citizens of the United States, who as members of the German-American Bund legitimately protested the vicious unconstitutionality of Section 308 (i).

But to condemn men under Section 311 only because they protested the ghastly Section 308 (i) is to compound the hysterical un-Americanism of the latter section.

As to the protesting Bundists, Sections 311 and 308 (i) are indeed "inextricably interwoven" (fol. 26, R. p. 17). And unconstitutional.

It may be urged that Section 308 (i) with its mandatory "shall not be filled" is merely an expression of Congressional policy rather than a "requirement" in the sense in which the word "requirement" is used in Section 311. To urge such a contention is to ignore realities.

In *Martin v. City of Struthers, Ohio*, 319 U. S. 141, it was stated by Mr. Justice Murphy:

> "* * * nothing enjoys a higher estate in our society than the right given by the First and Fourteenth Amendments freely to practice and proclaim one's religious convictions (cf. Jones *v.* Opelika, 316 U. S. 584, at 621). *The right extends to the aggressive and disputatious as well as to the meek and acquiescent.* The lesson of experience is that—with the passage of time and the interchange of ideas—organizations once turbulent, perfervid and intolerant in their origin, *mellow into tolerance and acceptance by the community or else sink into oblivion*". (Italics ours.)

In the same case Mr. Justice Frankfurter stated:

> "* * * law, whether derived from acts of Congress or the constitution, is not an abstraction. *The constitution cannot be applied in disregard of the external circumstances in which men live and move and have their being.* Therefore neither the First nor the Fourteenth Amendment is to be treated by judges as though it were a mathematical abstraction, an absolute having no relation to the lives of men". (Italics supplied.)

It is respectfully urged, moreover, that Section 308 (i) is *a chameleon statute* in which the mandatory "shall not be filled" italicizes itself when the plaid is turned one way and the so-called "statement of policy" language is highlighted ("It is the expressed policy of the Congress") when the statute is focussed in the white light of the judicial microscope.

The defendants run the whole gamut from Agne, Schneller and Streuer on the one hand to Kunze on the other. The vast majority of them are simple, hard-working fraternal order "joiners" who all their lives have been bringing up themselves and their families in the fear of God and in loyalty to their country, the United States of America. They were informed, as the Record amply shows, that the officers of their fraternal order, the German-American Bund, on advice of the Bund's counsel (a New Jersey lawyer) had petitioned the Legislature to strike this unconstitutional clause from the statute; that they had petitioned the Executive to prevent its enactment into law, and finally that they were also planning (again on advice of counsel) to petition the Judicial Branch of Government in a "test case". Undoubtedly, and indeed beyond peradventure of a doubt, the vast majority of the defendants never read, however much they felt, the constitutional right of a citizen "to petition the Government for a redress of grievances" (Amendment 1). Are we to tell them now, after they have read it, that this constitutional "freedom" is but tinkling brass and sounding cymbal?

Moreover, "within the compass of September 7, 1940 and October 1, 1940, they had appealed to the legislature, they had appealed to the Executive, and so on, and then October 1940 was the starting of the appeal to the judicial branch of the Government" (Summation, fol. 848, R. p. 922). And "*the whole thing stopped there*" (Summation, fol. 1851, R. p. 923). "In connection with 37, is it not significant that after October 1, 1940 I cannot give you a definite date because the record is rather indefinite, but *for all practical purposes after that Bund Command came out, it was dropped.' You do not hear of it again until the F.B.I. in 1942 starts its New York to Seattle round-up on May 26, 1942, and shows these people photostats of Bund Command No. 37.*' They did not bring a test case.' *The Bund started to disintegrate and crumple*, and war was in the air and it was not in 1940, it was in

1941, * * * in 1941, December, we had Pearl Harbor. By that time some of the units of this Bund were down to three members—in the ashcan" (Summation, fols. 1849, 1850; R. p. 923).

In other words, the very fulcrum upon which the Government's case turns (Bund Command No. 37) had fallen into oblivion over one year prior to Pearl Harbor!

To our shame be it said that upon the history revealed in this record we have thrown men into jail, deprived them of their liberties and curtailed the access to them of their families, who need them so much.

The unconstitutional and unconscionable provision found in Sec. 308 (i) first appeared in the Statute on September 7, 1940 (fol. 420; R. p. 210). Its own sponsor even then had serious misgivings as to its constitutionality, as is apparent from the statement of Representative Mundt on the floor of the House of Representatives when Sec. 308 (i) was first introduced as an amendment to the Selective Training and Service Act (Defts. Ex. C, fol. 422, p. 211):

> "We all know that constitutionally we cannot make this mandatory."

Yet in the very heart of the section is found the mandatory verb:

> "shall not be filled"!

(See the discussion at fols. 1718-1725, 1731-1743, 422-429, 162, 165, 172, 174; R. pp. 858-862, 865-871, 211-215, 83, 84, 88).

Such phraseology is deceptive and a trap for the uneducated. Strictly to enforce a penal statute containing language such as that would be to substitute the viciousness of Fascism for the fair play of Democracy.

In *Hartzel* v. *United States*, —— U. S. ——, 88 Law Ed. 1164 (June 12, 1944, No. 531 Oct. Term, 1943, cert. gr. 320 U. S. 734), in construing 50 U.S.C. Sec. 31 *et seq.*, this Court stated, *per* Murphy, J.:

"'Such legislation, being penal in nature, and restricting the right to speak and write freely, must be construed narrowly and 'must be taken to use its words in a strict and accurate sense' ", citing Holmes, J., dissenting in *Abrams v.* United States, 250 U. S. 616, 627.

The Court stated further, *per* Murphy, J.:

"Few ideas are more odious to the majority of the American people or more destructive of national unity in time of war. *But while such iniquitous doctrine may be used under certain circumstances as vehicles for the purposeful undermining of the morale and loyalty of the armed forces and those persons of draft age; they cannot by themselves be taken as proof beyond a reasonable doubt that petitioner had the narrow intent requisite to a violation of this statute.*"

• • •

"'Thoughtlessness, carelessness and even recklessness are not substitutes for the more specific state of mind which the statute makes an essential ingredient of the crime.'"

• • •

"We are not unmindful of the fact that the United States is now engaged in a total war for national survival and that total war of the modern variety cannot be won by a doubtful, disunited nation in which any appreciable sector is disloyal. • • • *But the mere fact that such ideas are enunciated by a citizen is not enough by itself to warrant a finding of a criminal intent* to violate Sec. 3 of the Espionage Act. *Unless*

*there is sufficient evidence from which a jury could infer beyond a reasonable doubt that he intended to bring about the specific consequences prohibited by the Act, an American citizen has the right to discuss these matters either by temperate reasoning or by immoderate and vicious invective * * *."*

Finally, the Court should consider the question of constitutionality in the light of the fact that in the case at bar the indictment charges an act the doing of which was concededly consistent with innocence, as follows:

The indictment charges (R. p. 3) that in Bund Command #37 the defendants urged "everyone *who can take it upon himself*" to refuse to do military service until certain laws restricting the rights of Bund members were repealed.

The Government translator, Warner, "conceded" and testified that the German words for the words italicized in English above include the connotation "if he can *properly* do so" (fols. 158 through 160; R. pp. 81-82).

Hence the indictment's chief charge was that the defendants urged a person to refuse to do military service for a certain period "if he can properly do so." This is not an allegation of crime.

The point was also saved by a Request to Charge that

> "If any defendant did no more than read Bund Order No. 37, understanding the words 'if he can' to mean 'if he can properly do so' he is not guilty of the crime charged".

This request was not granted and exceptions were duly noted (fols. 2057, 2076, 2079, 2080; R. pp. 1022, 1030, 1032, 1033).

This Court has clearly stated that it is an act of unwisdom, injustice and un-Americanism to impute "the reprehensible interpretation to a member of the organization in the absence of overt acts indicating that such was *his* interpretation" (italics supplied).

In *Schneiderman v. United States*, —— U. S. ——, 63 Sup. Ct. Rep. 1333, decided June 21, 1943, after argument by a gallant American, whose spirit speaks to us today from a fresh-turned grave in Rushville, Indiana, it was held that (matter in parentheses and italics supplied):

> "Our relations with Russia (Germany) as well as our views regarding its government and the merits of Communism (Hitlerism) are immaterial to a decision of this case. * * *. For some time the question whether advocacy of governmental overthrow by force or violence is a principle of the Communist Party of the United States (of the German-American Bund) has perplexed courts, administrators and students. This court has never passed upon the question whether the party (Bund) does so advocate and it is unnecessary for us to do so now. * * *
>
> "We do not decide what interpretation of the party's (Bund's) attitude toward force and violence is the most probable on the face of the present record * * *. We hold only that *where two interpretations of an organization's program are possible, the one reprehensible * * * and the other permissible, the court in a * * * proceeding, is not justified in * * * imputing the reprehensible interpretation to a member of the organization in the absence of overt acts indicating that such was his interpretation.*"

CONCLUSION

The judgments of conviction of all petitioners should be reversed.

Dated: New York, October 20, 1944.

Respectfully submitted,

JOHN F. X. FINN,
Attorney assigned by the Circuit Court of Appeals below to the defense of the petitioner Rapp, whose services in this Court apparently have been rejected by said petitioner.
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